Nos. 93 - 1408, 93-1414, 93-1415

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In The

Supreme Court of the United States

October Term, 1994

NEW YORK STATE CONFERENCE OF BLUE CROSS AND BLUE SHIELD PLANS and EMPIRE BLUE CROSS AND BLUE SHEILD,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

(caption continued on reverse)

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR TRUSTEES OF AND THE PENSION, HOSPITALIZATION BENEFIT PLAN OF THE ELECTRICAL INDUSTRY AND TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 HEALTH CARE FUND, TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 RETAIL WELFARE FUND AND TRUSTEES OF AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 COMMERCIAL HEALTH CARE FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

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MARIO M. CUOMO, ET AL.,

Petitioners,

-against-

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

HOSPITAL ASSOCIATION OF NEW YORK STATE,

Petitioner,

-against-

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE

STATEMENT OF THE AMICI CURIAE

This Memorandum is submitted on behalf of the *amici curiae*, TRUSTEES of and THE PENSION, HOSPITALIZATION BENEFIT PLAN of the ELECTRICAL INDUSTRY ("ELECTRICAL INDUSTRY PLAN" or "PLAN") and THE TRUSTREES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 HEALTH CARE FUND, TRUSTEES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 RETAIL WELFARE FUND, as well as THE TRUSTEES of and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 174 COMMERCIAL HEALTH CARE FUND (collectively, "U.F.C.W. FUNDS" or "FUNDS"), in support of the arguments raised by the Respondents on this appeal.

Each of the *amici* plans is an "employee welfare benefit plan" as defined in the Employee Retirement Income Security Act of 1974, as amended ("E.R.I.S.A."). *See* 29 U.S.C. §1002(3). The trustees of each plan are fiduciaries as defined in E.R.I.S.A. *See* 29 U.S.C. §1002(21). The plans are established and maintained pursuant to collective bargaining agreements with multiple employers for the sole and exclusive purpose of providing and maintaining health care benefits, such as medical, surgical and hospital care, for its participants and their beneficiaries. Each plan currently provides one hundred (100%) percent coverage for all reasonably necessary hospitalization charges. Each plan was established pursuant to the Labor-Management Relations Act §302, 29 U.S.C. §186, and operates on a self-insured basis without stop-loss insurance coverage.

Pursuant to New York's Public Health Law ("P.H.L.") §2007-c(1)(b), the rate of reimbursement to hospitals for care rendered to inpatients enrolled in a self-

insured employee welfare benefit plan which provides for reimbursement directly to hospitals on an expense incurred basis, such as those of the *amici curiae*, is the applicable D.R.G. rate plus an additional "payor differential" of thirteen (13%) percent. In addition, P.H.L. §2807-c(1)(a)(iii) and 2807-c(14)(a)-(c) provide for a bad debt and charity care ("B.D.C.C.") allowance to be added onto each bill for inpatient hospital services rendered by a New York hospital. The B.D.C.C. surcharge was intended to compensate hospitals for services rendered to uninsured, underinsured, and the indigent patients which, in fact, requires the ELECTRICAL INDUSTRY FUND and the U.F.C.W. FUNDS to make payments for care rendered to non-participants and non-beneficiaries of the plan.

Each of the referenced statutorily mandated charges are the subject of an action now pending in the Eastern District of New York entitled *"Trustees of and The Pension, Hospitalization Benefit Plan of the Electrical Industry et al. v. Cuomo"*, CV-92-5589 (SJ).[1] In that action, the *amici curiae* seek to declare that, with regard to self-insured Taft-Hartley welfare plans, the two cited statutes are null and void and unenforceable as preempted by federal law. The plaintiffs in that action seek a permanent injunction as to the enforcement of those statutes against them. Of particular concern to the *amici curiae* is the precedential effect the holding in this matter will have on their E.R.I.S.A. §514(a) preemption argument.[2] In an effort to preserve their own legal

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[1] The motions and cross-motions for summary judgment in that action have been placed on hold pending this Court's determination on the instant appeal.

[2] The *amici curiae* have alleged in their federal action that compliance with the state mandates of 13% payor deferential and 6% B.D.C.C.

theories for the trial court in *Trustees v. Cuomo*, as well as to demonstrate to this Court the repercussions of its holding at bar, the *amici curiae* submit this Memorandum in support of the Respondents in this appeal.

Whereas both commercial insurers and self-insured funds are referenced in P.H.L. §2807-c(1)(b), the thrust of the underlying action has been focused on the commercial insurers. On this appeal, the *amici curiae* shall emphasize the concerns of Taft-Hartley self-insured funds so that this Court will become cognizant of the dramatic consequences of the thirteen (13%) percent "payor differential" on all such plans which must live with its wrath.

ARGUMENT[3]

The ELECTRICAL INDUSTRY PLAN and the U.F.C.W. FUNDS each pay approximately six (6%) percent on bills it receives from its participants and their beneficiaries for bad debt and charity care ("B.D.C.C."). When coupled with the thirteen (13%) payor differential, this Court can see that these surcharges create a

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challenged therein places the trustees at risk of violating their fiduciary duty as codified in E.R.I.S.A.'s "exclusive benefit rule". E.R.I.S.A. §403(c)(1) and 404(a)(1)(A), 29 U.S.C. §§1103(c)(1) and 1104(a)(1)(A). The trustees are placed in an unenviable position of complying with both E.R.I.S.A.'s mandate to act "solely in the interest" of participants and beneficiaries and the "community interest" mandate by the state in the P.H.L. by means of surcharges for the care of non-participants and non-beneficiaries. This argument was not raised at bar by Respondents, thus, will remain unaffected by this Court's holding.

[3] In the interest of brevity, the *amici curiae* adopt the Statement of Issues and Factual Background as drafted by Respondents, *Travelers Insurance Company, Inc., et al*, in their Memorandum filed with this Court on this appeal.

substantial adverse economic impact on these employee welfare benefit plans.

1. Effect:

Based on affidavits filed by the fund administrators of the *amici curiae* in *Trustees v. Cuomo*, it has been established that the ELECTRICAL INDUSTRY FUND expended $3,634,466.00 for B.D.C.C. in the period 1990-92. During the same period, the U.F.C.W. FUNDS expended $631,289.00 for B.D.C.C. The payor differential which is the subject of this appeal costs each of the funds more than two times what they spent on charity care! In a time when employer contributions are declining, the impact of these surcharges threatens to cripple the operation of these employee welfare benefit plans. As an example, the ELECTRICAL INDUSTRY PLAN has experienced a net decrease in that fund's balance for 1991 of seven million dollars and a further net decrease for 1992 of twelve million, two hundred thousand dollars!

Such an impact was the proximate cause of the trustees' amendment to the plan documents of the ELECTRICAL INDUSTRY PLAN to decrease the benefits offered to the participants and their beneficiaries. The employer contribution rate was increased as was the deductible for both individual and family subscriptions to that welfare plan. The schedule of reimbursement for covered medical services was calculated on a usual and customary schedule which resulted in significant co-payments for participants whose doctor's fees exceed the allowable charges contained in the PLAN. Additionally, the prescription drug benefit was amended to reimburse participants for the cost of prescription drugs based on the costs of generic equivalents.

The P.H.L. subjects the ELECTRICAL INDUSTRY PLAN (which has participants in numerous states) to inconsistent state regulation since the PLAN is required to pay for services rendered in hospitals in other states. For instance, the B.D.C.C. surcharge is not universal. It is just such "patchwork regulation" which E.R.I.S.A. was designed to eliminate. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) quoting Representative Dent and Senator Williams.

As self-insured funds, the *amici curiae* have demonstrated in *Trustees v. Cuomo* that these surcharges result in *direct* out-of-pocket losses constituting reduction in fund reserves. As a result, the self-insured welfare fund has less protection against catastrophic loss. Additionally, the fund administrators have pointed to the lost interest income and investment opportunities as a result of the drain on the FUNDS' treasury caused by these state mandated surcharges.

2. Theory:

The plaintiffs in *Trustees v. Cuomo* have theorized, in part, that the surcharges are preempted by E.R.I.S.A. §514(a), based on Supreme Court precedent, since the state statutes challenged therein "relate to" an employee benefit plan because it has a "connection with" such plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). *See also, District of Columbia v. Greater Washington Board of Trade*, 506 U.S.____, 113 S.Ct. 580, 583 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 483 (1990). Specifically, the employee welfare benefit plans argue, in part, that there is a "connection with" the plans and the payor differential

and B.D.C.C. surcharges since the challenged state statutes:

1. have a substantial adverse economic impact upon self-insured welfare plans;[4]

2. require the funds to reimburse the participants and their beneficiaries at thirteen (13%) percent and six (6%) percent, respectively, above the level obligated to be paid under the plan documents;

3. require an increase in the administrative burden of providing for a uniform level of benefits nationwide in the face of inconsistent state regulation over hospital reimbursement;

4. impose upon E.R.I.S.A. plans the necessity to structure benefits so as to include non-participants and non-beneficiaries, thus, affecting relations among principal plan entities; and

5. impact on core decisions which self-insured, union welfare benefit plans must render as to how to finance their participants' and beneficiaries' inpatient hospital care in the most cost-efficient manner.

3. Circuit Court Decision in Travelers:

The Circuit Court in *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), held that the thirteen (13%) percent payor differential was preempted by E.R.I.S.A. §514(a) since the state law has a "connection with" an

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[4] As contrasted with the Respondents' insured plans, the state surcharges for inpatient hospital services create a *direct* out-of-pocket loss for the self-insured PLAN and FUNDS.

employee welfare benefit plan. The Circuit Court rationalized its holding by stating that the state statute had an indirect economic impact upon E.R.I.S.A. plans which was substantial and impermissibly affected the structure, administration, or the type of benefits furnished by the welfare plan. "The surcharges substantially increase the cost to E.R.I.S.A. plans of providing beneficiaries with a given level of health care benefits." *Id.* at 720. Additionally, the thirteen (13%) percent payor differential effects the plan's determination of how best to fund their level of benefits.

In the *Travelers* case, the Circuit Court drew the following conclusions of law which are of great importance to the *amici curiae* in *Trustees v. Cuomo* which they would like to see this Court adhere to in its decision on this appeal:

a) the challenged surcharges "relate to" E.R.I.S.A. plans because they have a "connection with" such plans;

b) *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied* 472 U.S. 1008 (1985) is no longer good law;

c) disavowed the Third Circuit's majority ruling in *United Wire, Metal & Mach., Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S.Ct. 382 (1993) and cited favorably to Judge Nygaard's dissent in that case;

d) the thirteen (13%) percent payor differential "...force[s] E.R.I.S.A. plans to increase either plan costs or reduce plan benefits", *id.* at 720, thus, impermissibly affects the structure, administration, or the type of benefits furnished by a plan; and

e) found that differentials in rates of payment to hospitals by various classes of payors "...purposely interfere with the choices that E.R.I.S.A. plans make for

health care coverage" because such surcharge "substantially increase[s] the cost to E.R.I.S.A. plans of providing beneficiaries with a given level of health care benefits." *Id.* at 719-720.[5]

4. Policy Considerations:

The PLAN and FUNDS' action does not seek to challenge New York's authority to regulate hospital costs, but only the methodology used to reimburse hospitals for inpatient services. The *amici curiae* are concerned that self-insured E.R.I.S.A. plans pay disproportionately to underwrite the social contract of providing care to uninsured and underinsured patients when such noble endeavors are more equitably achieved by a tax of general application rather that this "sick tax" imposed on patients and their health care insurer. As demonstrated above, the increased financial burden on the welfare plans to fund the B.D.C.C. and payor differential surcharges reduces the benefits to plan participants threatening the continuation of the current level of benefits, especially to retirees. The hospital reimbursement add-ons mandated by the P.H.L., increase the costs of health benefits on the employer resulting in the de-stabilization of collective bargaining where wage increases have been depressed recently in order to minimize further reductions in health care benefits. Finally, the add-ons subsidize non-union, non-contributing employers who often do not provide

[5] Despite the success of the E.R.I.S.A. preemption argument below, the payor differential remains because, due to the addition of §162(n) to the Internal Revenue Code, employers in New York will lose certain tax deductions relating to the costs of providing health care coverage to participants if their plans do not pay the New York mandated surcharges, including the differential. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 §13442, 107 Stat. 568.

health care to their employees, thus, creating for them an unfair competitive advantage over employers who make contributions to employee welfare benefit plans on behalf of their employees. "The Act provides a conduit by which money is transferred from, among others, E.R.I.S.A. plans to hospitals. Rather than spend its own general funds, New Jersey implemented a money transfer scheme where E.R.I.S.A. plans subsidize the medical bills of those who are favored by law." *United Wire, Ibid.*, 995 F.2d 1179, ____ (3d Cir. 1993), quoting from Judge Nygaard's dissent.

5. Recent Law:

Despite Petitioners' claim to the contrary in *Trustees v. Cuomo*, the B.D.C.C. add-on is not a normal cost of doing business. Such surcharge differs from normal overhead costs since the plan participants and their beneficiaries of self-insured Taft-Hartley welfare funds derive no benefit from this add-on while contributing to none of its need. Further, this surcharge is not equitably distributed since it is only paid by a small portion of the general populace. The marketplace analogy for charity care constitutes a poor template since no vendor would knowingly sell to a customer whom it knew could not pay in full. Additionally, in the marketplace, vendors spread their bad loss (as the *amici curiae* contend is appropriate) throughout its *entire* customer base and not a few "well-heeled" customers.

Recent opinions filed since the Circuit Court ruled in *Travelers* further justify the *amici curiaes'* claims and negate Petitioners' defenses in *Trustees v. Cuomo*. In *New England Health Care Employees Union District 1199, S.E.I.U. et al. v. Mount Sinai Hospital*, 846 F. Supp. 190, 198-199 (D. Conn. 1994), then Chief Judge

Cabranes held that Connecticut's Uncompensated Care Pool Act was preempted by E.R.I.S.A. §514(a), 29 U.S.C. §1144(a). Judge Cabranes also denied the state's Medicaid defense (also raised in *Trustees v. Cuomo*), that is, that a finding of preemption of the state law will "impair" another federal statute, thus, it should be saved by E.R.I.S.A. §514(d), 29 U.S.C. 1144(d). Since Section 514(d) is not a general savings clause to Section 514(a), the court's conclusion that "[n]othing in the Medicaid Act requires states to impose health-care related taxes which pass the costs of uncompensated care onto paying patients" was crucial in denying such defense. The court found that uncompensated care can be funded in a variety of alternate ways, such as real estate, income, and sales taxes. Since the Madicaid Act does not depend on the challenged state law for its enforcement, the federal act would not be "impaired" by a finding of E.R.I.S.A. preemption. See also *Connecticut Hospital Assn. v. Pogue*, _____F. Supp. _____ (D. Conn. Nov. 17, 1994), Judge Covello: Connecticut's newly created uncompensated care financing mechanism --- six (6%) percent sales tax on patient services as sell as an eleven (11%) percent tax on gross hospital revenues --- was preempted by E.R.I.S.A. The District Court reasoned that the new state law was targeted at the health care industry --- a venue where E.R.I.S.A. plans must operate. Additionally, Judge Covello reasoned that the new state law had "...a substantial economic impact on E.R.I.S.A. plans, causing such plans to either increase costs or reduce benefits..."[6]

The Second Circuit recently held that P.H.L. §2807-d, which imposes a .006% tax on gross receipts of

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[6] Judge Covello also denied the Medicaid defense pursuant to similar reasoning utilized by Chief Judge Cabranes in *New England Health Care Employees Union, Ibid.*

two medical centers operated by an employee welfare benefit fund was preempted by E.R.I.S.A. *NYSA-ILA and Clinical Services Fund v. David Axelrod, M.D.*, 27 F.3d 823 (2d Cir. 1994). The Court reasoned that P.H.L. §2807-d has a "connection with" the employee welfare benefit fund since the state mandated tax will cause the fund to reduce benefits and/or increase costs. It is just such legal rationale which the *amici curiae* believes should be continued if the cost of health care is to be equitably financed in our nation.

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment below.

Dated: December 7, 1994

Respectfully submitted,

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